SUBJECT INDEX.
BRIEF OF THE ARGUMENT.

PAGE

STATEMENT OF THE CASE 1

Principal Questions Presented 3

FIRST POINT—A bankrupt whose books, papers and documents have passed out of his possession without his protest and without express reservation of any constitutional right, may not invoke a privilege either under the Fourth or under the Fifth Amendment 4

SECOND POINT—A bankrupt may not invoke any privilege under the Fourth or Fifth Amendments to the Constitution of the United States against prosecution by state authorities 7

TABLE OF CASES.

Barron *v.* Baltimore, 7 Pet. 243..... 7

Boyd *v.* United States, 116 U. S. 616, 633, also p. 630 8

Brown *v.* Walker, 161 U. S. 591 (at p. 608) 7

Bram *v.* U. S., 168 U. S. 532, 544 8

Ensign *v.* Pennsylvania, 227 U. S., 592, 597 . 6, 7, 8

Hale *v.* Henkel, 201 U. S., 43, 69 ..... 7, 8

	PAGE
Harris, Matter of, 221 U. S., 274, 280.....	4, 5
Jack *v.* Kansas, 199 U. S. 372, 382.....	7
Johnson *v.* United States, 228 U. S., 458...	4, 5, 6
Lewis Publishing Co. *v.* Wyman, 228 U. S. 610	3
Pearlman *v.* United States, 247 U. S., 7....	6
Schonfeld *v.* United States, 277 Fed., 934 (certiorari denied 258 U. S. 623).....	6
Stroud *v.* United States, 251 U. S., 15, 21..	6
Twining *v.* New Jersey, 211 U. S., 78, 93-114	7, 9
U. S. *v.* Evans, 213 U. S. 297.....	3
Wheeler *v.* United States, 226 U. S. 478, 490	6
Wise *v.* Mills, 220 U. S. 549.....	3
Weeks *v.* U. S., 232 U. S. 383, 398.....	3

Supreme Court of the United States.

OCTOBER TERM—1921.

No. 330.

IN THE MATTER

of

ELMORE D. DIER, HARRY J. LAWRENCE, JR. and LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. Dier & Co. and E. D. DIER & Co., Bankrupts,

Appellants,

JOAB H. BANTON, District Attorney of New York County, and MANFRED W. EHRICH, Trustee in Bankruptcy of E. D. Dier & Co.,

Appellees.

BRIEF FOR APPELLEE, MANFRED W. EHRICH, TRUSTEE IN BANKRUPTCY.

Statement of the Case.

Appellee Ehrich, the Trustee in Bankruptcy, joins in the brief submitted by Appellee Banton, the District Attorney of New York County, and

in the Statement in that brief contained (pp. 1-4). Appellee Ehrich takes this occasion to supplement that Statement by the specific correction of an erroneous declaration in the brief of the appellants. Proposing no reference to any page of the record, appellants say (Appellants' brief, page 4): "The Receiver *took* possession without notice of any kind. There was at no time a voluntary surrender by E. D. Dier & Company to the Receiver and the Receiver's possession of the books was at all times an enforced possession." (Italics appellants'). No such contention is made or suggested in the very petition (Record pages 3-4) from whose denial the appeal is taken (Record, pages 13-14). The statement quoted is then an unsupported statement. We deem it not improper to add (appellants having thus travelled outside the record in order to raise this issue) that that statement is furthermore a mistaken statement and that this circumstance the records of this court indicate. From an affidavit on file in this court it appears: "The bankrupts voluntarily handed over to the Receiver in Bankruptcy the books and papers now sought by subpoena. Some of these records were handed over to me personally as the Receivers' representative; other papers were to my own knowledge handed over to the Receiver personally by the bankrupts and their present attorney Nash Rockwood, Esq. At the time of turning over of such books and papers *no protest of any kind* was made by the bankrupts or their attorneys." (Affidavit of Saul S. Myers in opposition to a stay sworn to May 13, 1922; [italics in original] the stay was denied by order of this court May 29, 1922).

The case was heard below on a rule *nisi*. No answer was filed. The court below recited that the

"alleged bankrupts without objection surrendered possession of the books to the Receiver, who now holds them" (Record, p. 5).

The petition below is to enjoin and restrain the Receiver from turning the books over to the District Attorney of New York County (Record, pp. 3-5). The petition was denied and the delivery to the District Attorney "for use in said criminal proceeding against said Petitioners" ordered (Record, p. 9). The receivership terminated with the petitioners' adjudication as bankrupts (Record, p. 8) and has been succeeded by a trusteeship (Record, p. 8). The records of this court show that a stay pending the appeal was denied (order of this court May 29, 1922). In the circumstances —the instant application being directed not to getting the papers back from the New York officials (compare as to the procedure *Wise* v. *Mills*, 220 U. S. 549; *Weeks* v. *U. S.*, 232 U. S. 383, 398) but to restraining those officials from taking them —it is submitted that the issue is moot. (Compare *U. S.* v. *Evans*, 213 U. S. 297; *Lewis Publishing Co.* v. *Wyman*, 228 U. S. 610).

Questions Involved.

The questions raised by the present appeal—assuming, indeed, for the purposes of argument that any actual controversy remains—are two:

I. Whether a bankrupt who has turned over his books, records and documents to a Receiver in involuntary bankruptcy proceedings without making any claim of right to be protected against their subsequent use in a criminal prosecution, can restrain such use by prosecuting officers, either state or federal.

II. Whether a bankrupt may invoke any privilege under the Fourth or Fifth Amendments to the Constitution of the United States against prosecution by state authorities.

Upon the former of these questions we shall offer in the brief which follows rather casual additions merely to the argument in the District Attorney's brief; to the latter we shall devote a short, independent discussion.

POINT I.

A bankrupt whose books, papers and documents have passed out of his possession without his protest and without express reservation of any constitutional right, may not invoke a privilege either under the Fourth or under the Fifth Amendment.

1. It has never been decided that a bankrupt even if he invokes his alleged right at the time of turning over the documents, has any constitutional privilege against their subsequent use in any prosecution. In *Matter of Harris,* (221 U. S. 274, 280) this Court did indeed refer, with apparent approval, to "the properly careful provision to protect him [the bankrupt] from use of the books in aid of prosecution." This "provision" was made at the commencement of the receivership. In *Johnson* v. *United States,* (228 U. S. 458) this Court, however,—while emphatically deciding that the bankrupt had no greater right than had been given him in the *Harris* case—specifically noted a doubt "if there were any" constitutional rights involved.

2. Appellant's case is necessarily and explicitly premised upon the proposition that there is a legal difference between the use of the books after they have passed into the Trustee's possession (as in the *Johnson* case) and their use after they have passed into the Receiver's possession. The answer to that contention is to be found in the *Johnson* case itself. For that case, as we have just noted, was decided after the *Harris* case. And the *Harris* case was a case where, as in this case (at the time of the petition), there had been a re-

ceivership only, not a trusteeship. The Court in the *Johnson* case took no distinction based upon the nature of the custody into which the bankrupt's books had passed. Its *sole* distinction was a distinction resting upon the fact that in the *Harris* case the bankrupt asserted and tried to preserve his alleged right at the time the documents passed out of his control. The *Harris* case, this Court declared in the *Johnson* opinion, "marked the *limit of the law in a case where no rights, if there were any, were saved when the books were transferred.*" In the *Johnson* case, then, this Court passed over as unworthy even of discussion the distinction upon which the present appeal is based; and at the same time drew a distinction which is fatal to the appellant's whole argument.

3. The only conceivable distinction between the use of the documents after they have passed into the Receiver's hands and their use after they have passed into the Trustee's hands is a distinction which this Court has in principle rejected again and again. It is a distinction which appellants themselves thus formulate (appellant's brief, p. 6) "a Trustee under the Bankruptcy Act has title, whereas a Receiver is only an arm of the court to hold possession without title." But it is precisely possession—and not title—that in these cases is all-important. Thus it has been squarely decided by this Court that there is no privilege against the use by the District Attorney of documents deposited in court as exhibits in a civil litigation (*Pearlman* v. *United States*, 247 U. S. 7); such exhibits, precisely like the documents in the case at bar, are in the custody of the law and out of the possession of the owner. So there is no

privilege against the use of bankruptcy schedules in a criminal prosecution in the state (Ensign *v.* Pa., 227 U. S. 592; see *infra*, p. 10)—or even, it seems, in the federal (*Schoenfeld* v. *United States*, 277 Fed. 934; certiorari denied, 258 U. S. 623)—courts. There is no privilege, again, against the use of letters written by a prisoner and read by the warden of the penitentiary (*Stroud* v. *United States*, 251 U. S. 15, 21). And precisely as one who surrenders possession loses his privilege even though he keeps title, so one cannot acquire a privilege (to which he has no other claim) by acquiring title (compare *Wheeler* v. *United States*, 226 U. S. 478, 490, and note the citation of this case in *Johnson* v. *U. S.*, *supra*.).

POINT II.

A bankrupt may not invoke any privilege under the Fourth or Fifth Amendments to the Constitution of the United States against prosecution by state authorities.

It is a *State* officer—"the District Attorney of the County of New York" (p. 4)—whose activities appellants seek to thwart. It is a fear of the use of the documents in proceedings under the jurisdiction of the *State*—proceedings "before the Grand Jury of the County of New York" (p. 4)—that appellants admit. And yet it is a right under "the Fourth and Fifth Amendments to the Constitution of the *United States*" that appellants assert (p. 4).

The two amendments, upon elementary principles, give no protection against state action whatever, (*Barron* v. *Baltimore*, 7 Pet. 243; *Twining* v. *New Jersey*, 211 U. S. 78, 93; *Ensign* v. *Pa.*, 227 U. S. 592, 597).

The decisions have indeed done much more than settle the principle that no Federal question under the Fourth or Fifth Amendments is involved in the compulsory production of documents or the compulsory giving of testimony in the state courts. They have settled, as well, the principle that a witness may not refuse to give testimony in the Federal courts because it might subject him to a State prosecution (*Hale* v. *Henkel*, 201 U. S. 43, 69; see also *Brown* v. *Walker*, 161 U. S. 591 at p. 608). So, too, there is no right to withhold testimony in a State court because of the fear of a Federal prosecution (*Jack* v. *Kansas*, 199 U. S.

372, 382). "The only danger to be considered is one arising in the same jurisdiction and under the same sovereignty" (*Hale* v. *Henkel, supra.*). Upon like grounds—for the "relation between the two amendments" (the Fourth and Fifth) is "intimate" (*Boyd* v. *United States,* 116 U. S. 616, 633; see also p. 630; and see *Bram* v. *U. S.* 168, U. S. 532, 544)—the production of documents may not be refused in the courts of one jurisdiction because of a fear of consequences in the other.

How elementary are these principles a phrase in Mr. Justice Pitney's opinion in *Ensign* v. *Pa.* (*supra*) well illustrates. Mr. Justice Pitney there held as matter of course that the admission in a state prosecution of schedules in bankruptcy involved no Federal *constitutional* question. The "one" question that was even "debatable" (227 U. S. at p. 598) was a question (not here presented) arising under a *statute.*

We may state the effect of the foregoing principles concretely. The bankrupt would have had no right under the Fourth or Fifth Amendments to have refused himself to testify in the state courts, or to have withheld his books from the state court even if he had *kept* possession of them. Certainly he gained no new rights because he *lost* possession.

The only rights which the bankrupt even claims are, as we have seen, rights under the Fourth and Fifth Amendments. It may, however, be worth noting that had he relied upon the Fourteenth Amendment the result would have been the same. It has been precisely decided that the avoidance of self-incrimination in a state court prosecution is neither an incident of liberty as defined by the

due process provision nor a privilege or immunity of federal citizenship (*Twining* v. *New Jersey*, 211 U. S. 78, 93-114). Such, and even more plainly, must be the law with respect to searches and seizures.

Respectfully submitted,

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